Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES,
Appellant,

vs.

GEORGE P. LIES & CO.,
Appellees.

Brief in Opposition to Application for Writ of Certiorari.

The opinion of the Court of Appeals in this case is such a conclusive refutation of the contention of the Solicitor-General that, notwithstanding the fact that it is annexed to the certified copy of the record filed on this application, we have deemed it wise, for the convenience of the Court, to annex it as an appendix to this brief memorandum in reply, and we most respectfully request a careful perusal of it before a decision is made on this application.

Two questions are raised by the Solicitor General on this application:

1st. That the decision of the Board of General Appraisers (affirmed by the Circuit Court and Court of Appeals) was erroneous.

2d. That the Collector had the right to have these errors reviewed and corrected in the courts, notwithstanding he had never filed any petition for review containing a statement of the errors of law and fact complained of, as required by Section 15 of the Customs Administrative Act.

If the Solicitor-General is wrong in his second contention, it becomes unnecessary to consider his first. And it is, in our opinion, so clear beyond question that his contention as to the right of review is erroneous that in this brief reply we shall make no further reference to his contention that the decision of the Board of General Appraisers is in conflict with later decisions of this Court, than to state at this point that *we emphatically deny that any such conflict exists*, or that there is any error in the decision of said board. On the contrary, we insist that the decision of the board is in entire harmony with the decision of this Court and of the Circuit Court of Appeals, and that it is only by misreading and misconstruing the Court's decisions that a plausible foundation is laid for claiming an inconsistency. When, in a proper suit, where the government is entitled to raise these questions, this contention as to inconsistency is urged, we shall be prepared to show that the decisions of the Courts, as properly read and interpreted in the light of the records in the cases decided and the points involved, are consistent one with the other, and that the decision of the Board of General Appraisers is in harmony with all of them.

But these questions need not now be considered, because *the only parties who have, under the law, a right to have this decision reviewed have acknowledged it to be correct*, and the party who now seeks to review the decision (the United States) has no right to such a review by reason of its *failure to comply with the statutory formalities* which are a *condition precedent* to the assertion of such a right.

Prior to August 1st, 1890, erroneous classifications and assessments were reviewed in common-law suits against Collectors wherein the entire burden was cast upon the importer of proving, first, that the classification was erroneous, and, second, that he had complied with all the requirements imposed by statute as conditions precedent to his procuring such a review. The Collector was a mere nominal defendant, and the statutes imposed no conditions whatever upon him as to the conduct of the litigation.

The Customs Administrative Act revolutionized the procedure in this regard. It created a Board of Customs Experts to pass upon protests against the action of Collectors, and in express terms *made the decision of that board final against the Collector and Secretary of the Treasury* (as well as the importer) unless the dissatisfied party filed a petition in the Circuit Court within a prescribed time, setting forth the errors of law and fact which he wished to have reviewed. The language of the statute (Sections 14 and 15) is as follows:

Their decision, or that of a majority of them, shall be *final and conclusive* upon all persons interested therein, and the record shall be transmitted to *the proper collector* or person acting as such, who *shall liquidate the entry accordingly*, except in cases where an application shall be filed in the Circuit Court within the time and in the manner provided for in Section 15 of this act."

" Section 15. That if the owner, importer, consignee or agent of any imported merchandise, *or the Collector, or the Secretary of the Treasury*, shall be dissatisfied with the decision of the Board of General Appraisers, as provided for in Section 14 of this act, as to the construction of the law and the facts respecting the classification of such merchandise, and the rate of duty imposed thereon under such classification, they, or either of them, may, *within thirty days next after such decision and not afterward*, apply to the Circuit Court of

the United States within the district in which the matter arises for a review of the questions of law and fact involved in such decision. **Such application shall be made by filing in the office of the Clerk of said Circuit Court a concise statement of the errors of law and fact complained of, and a copy of such statement shall be served on the Collector, or on the importer, owner, consignee or agent, as the case may be."**

It will be noted that the portion of Section 14 of the Act above quoted does not appear in the Solicitor-General's brief at all, that a material portion of Section 15 is slurred over with asterisks, and that the words of Section 15 printed above in heavy black type, though quoted by the Solicitor-General and referred to in one line on page 11 of his brief are not discussed by him, and *no attempt whatever is made by him to explain why these words should be inserted in the statute if they have no further significance than that which he allows them.*

Why should a dissatisfied party be required to file a petition for review within "thirty days next after" a decision "and not afterwards" if he can have the decision reviewed at any time afterwards without filing any petition at all?

Why should a dissatisfied party be required to "file a concise statement of the errors of law and fact complained of," if, as the Solicitor-General claims, the whole case may be reviewed, not only at his instance, but even at the instance of the party who filed no petition at all.

Why should the statute require a copy of the concise statement to be served "upon the Collector or upon the owner, importer, consignee or agent, as the case may be," if the information it contains is useless to him, because he knows that any question raised by either party may be argued and decided by the Court, irrespective of whether it is referred to in the petition or not.

The requirements of Sections 14 and 15 of the Customs Administrative Act are, like the requirements of Sections 3011 and 2931 of the Revised Statutes, which they superseded, *conditions precedent* to a right of review. The difference between the two systems is that under the present system, as to decisions of the Board of General Appraisers, *the conditions precedent to a right of review apply to the Government* (through the Collector or Secretary of the Treasury) *as much as to the importer*. Referring to the statutory requirements as to protest and suit under the old system, this Court said in Arnson vs. Murphy (115 U. S., 579, at p. 584):

"We are of the opinion that it is incumbent upon the importer to show, in order to recover, that he has fully complied with the statutory conditions which attach to the *statutory action* provided for."

"The conditions imposed by the statute cannot, any of them, be regarded as matters a failure to comply with which must be pleaded by the defendant as a statute of limitation. *The right of action does not exist independently of the statute, but is conferred by it.*"

And in Davies vs. Arthur (96 U. S., 148, at p. 151):

"He must set forth in his protest the grounds upon which he objects, distinctly and specifically, the reason being, as ruled by Chief-Justice TANEY, that *the words of the act* requiring the protest *are too emphatic to be overlooked* in the construction of the provision (Mason vs. Kane, Taney's Dec., 177").

"Two objects, says Judge CURTIS, were intended to be accomplished by the provision in the act of Congress requiring such a protest: (1) To apprise the Collector of the objections entertained by the importer, before it should be too late to remove them if capable of being removed. 2. To hold the importer to the objections which he then contemplated, and on which he really acted, and *prevent him, or others in his behalf, from seeking out defects in the proceedings, after the business should be closed*, by the payment of the money

into the treasury (Warren vs. Peaselee, 2 Curt., 235; Thomson vs. Maxwell, 2 Blatchf., 392)."

It will not, of course, be contended by the Solicitor-General, that while the party who has taken no appeal from the decision of the Board of General Appraisers may raise any question as to errors that may have occurred to him by the time the case is reached for argument, the dissatisfied petitioner shall be restricted to the errors set forth in the petition. The consequence of his contention being sustained would, therefore, be that the importer would not be held "to the objections which he then contemplated, and on which he really acted," and he would not be prevented, "or others in his behalf, from seeking out defects in the proceedings after the business should be closed." In other words, the Solicitor-General *would revive the very evils which the statutes have sought to abolish*, and reduce the administration of the revenue laws to chaos. If he is correct in his contention, all an importer has to do when an unfavorable decision is rendered on his protest by the Board of General Appraisers is to file a perfunctory and colorless petition in the Circuit Court *(a brief printed form could easily be sold like law-blanks by stationers)*, and he will thereafter be entitled to the benefit of anything in the way of a favorable decision that may turn up. Indeed, if it shall happen that the Collector has also been dissatisfied with the decision, and has filed a petition, he need not do even that.

It is respectfully submitted that *such a contention is unworthy of serious consideration*, and that, whether the amount involved is six dollars and ninety-one cents or six hundred and ninety-one thousand dollars, this Court should not be asked to give up its time to the argument of any such proposition.

It is just as important that this Court should pass on the question raised below in this case as it is that it should pass on the question whether two and two are four, or whether a part is equal to the whole.

The California Land Claim Statutes are not analogous to the Customs Administrative Law. Under those statutes the mere filing of a transcript of the proproceedings of the Board of Commissioners *operated* "*ipse facto as an appeal for the party against whom the decision shall be rendered.*" The Customs Administrative Law requires the dissatisfied party "within thirty days, and not afterwards, to file a concise statement of the errors of law and fact complained of." Whatever other analogies there may be between these two statutes *they are absolutely dissimilar in the very point which lies at the foundation of the present application.*

By reason of this essential difference between the statutes the case of Grisar vs. McDowell, relied on by the Solictor General, furnishes no support to the present application. But even in that case (where both parties had continued the contest in the Circuit Court), Mr. Justice FIELD said :

"Had the city accepted the leave granted, withdrawn her appeal and proceeded under the decree as final, such result (close of the controversy) would have followed."

And in view, no doubt, of this suggestion the Solicitor-General concedes :

"It follows that, *could the importers have obtained leave of court to withdraw their application* for review, and *withdrawn it* accordingly, *the United States might have been without remedy.*"

The judgment of the Circuit Court recites (fols. 69, 70) :

"And the said George P. Lies & Company *having conceded in open court that there was no error* in said decision of the Board of General Appraisers ;

"Now, *after hearing* W. Wickham Smith, of *counsel for said importers, in support of* the decision of said appraisers, and Wallace Macfarlane, *U. S. Attorney, in opposition thereto,*

"It is ordered, adjudged and decreed that the decision of the Board of General Appraisers be, and the same is hereby, *in all things affirmed.*"

Why a decision should become final against the Government if a claimant *withdraws his appeal* from it, but not if he *confesses its correctness* in open court and *insists on the affirmance* of it, the Solicitor-General does not tell us, and we think the Court will be at a loss to perceive.

It will thus be seen that so far as it has any application to the case at bar the case of Grisar vs. McDowell, so far from being an authority in favor of the Solicitor-General's contention, is an authority in support of the ruling of the Court of Appeals.

The application for a writ of *certiorari* should be denied.

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DAVID IVES MACKIE,
Attorneys for Appellees.

APPENDIX.

OPINION OF THE CIRCUIT COURT OF APPEALS.

LACOMBE, Circuit Judge:

A certain importation of leaf tobacco was classified for duty by the Collector at the port of New York, certain portions at 75 cents per pound, and certain other portions at 35 cents per pound. The importers being dissatisfied with such decision, did, within the proper time, in compliance with the provisions of Section 14 of the Customs Administrative Act of June 10, 1890, "give notice in writing to the Collector, setting forth therein distinctly and specifically the reasons for their objections thereto." The Collector thereupon transmitted the invoice and all the papers and exhibits connected therewith to the Board of General Appraisers. That board, in one particular, sustained the protest of the importers, and in all other particulars affirmed the decision of the Collector.

Being dissatisfied with the decision of the board, the importers applied to the Circuit Court for a review of the questions of law and fact involved in such decision, and filed, as the fifteenth section of the above-cited act requires, "a concise statement of the errors of law and fact complained of." Before the case was reached for hearing in the Circuit Court a decision of the Supreme Court was reported, which satisfied the importers that they had no chance of success. Therefore, when the case was called, they conceded in open court that there was no error in the decision of the Board of General Appraisers, and the Court adjudged that "the decision of the Board of General Appraisers be, and the same is hereby, in all things affirmed." The District Attorney on behalf of the United States insisted in the Circuit Court that that Court should re-

view the decision of the board as far as it was favorable to the importers. This the Court refused to do, and the United States has appealed from such decision.

The Circuit Court was clearly right. Section 14 provides that the decision of the Board of General Appraisers "shall be final and conclusive upon all persons interested, and the record shall be transmitted to the proper collector, * * * who shall liquidate the entry accordingly, except in cases where an application shall be filed in the Circuit Court within the time and manner provided for in Section fifteen of this act." Section 15 provides that if the owner, importer, consignee, or agent of imported merchandise, or the Collector, or the Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers, as provided for in Section 14 of this act, as to the construction of the law, and the facts respecting the classification of such merchandise, and the rate of duty imposed thereon under such classification, they, or either of them, may, within thirty days next, after such decision, *and not afterwards*, apply to the Circuit Court * * * for a review of the questions of law and fact involved in such decision. Such application shall be made by filing in the office of the Clerk of said Circuit Court *a concise statement of the errors of law and fact complained of*, and a copy of such statement shall be served on the collector or on the importer, owner, consignee or agent as the case may be.

The elaborate argument submitted upon the question whether or not the Board of General Appraisers is a court, and whether Congress had power, under the Constitution, to clothe it with judicial powers, is irrelevant. Congress has expressly provided, as it had the undoubted right to do, that the decision of the Collector as to rate and amount of duties on imported merchandise shall be final and conclusive, unless these questions are brought before the Board of General Appraisers in the manner provided in the act; and that the decision of the Board shall be

final and conclusive except when application for a review is made to the Circuit Court *in the manner provided in the act.* Names are nothing; it is immaterial whether this is called an appeal, or a review, or a transmission of the case; any person who is dissatisfied with a decision of the board must set forth his grounds of dissatisfaction and file the same in the Circuit Court and may apply to that Court for a review within thirty days next after such decision, *and not afterwards.*" If he fail to apply for a review within the limited time his remedy in the Circuit Court is lost. The case at bar is clearly distinguishable from Grisar vs. McDowell, 6 Wallace, 363, for in that case, as it is stated on page 367, "a transcript of the proceedings and decision of the Board [of land commissioners] was filed in the District Court; *this operating under the statute of August 31, 1852, as an appeal by the party against whom the decision was given.*" The Customs Administrative Act of 1890 contains no such clause, nor anything like it.

The decision of the Circuit Court is affirmed.